No. 489

SEP 22 1944

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMISON COAL AND COKE COMPANY, a Corporation,
Petitioner,

vs.

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, Deceased, and ERASTUS WELLS, J. CLARK STREETT and TOM K. SMITH, Trustees Under Indenture of Trust Dated December 28, 1934, Executed by Rolla Wells,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

JOSEPH H. GRAND,
JAMES C. JONES, JR.,
LON O. HOCKER,
Counsel for Petitioner.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner, Jamison Coal and Coke Company, a corporation of Pennsylvania, on February 17, 1943, instituted suit in the United States District Court for the Eastern District of Missouri in which it asked the Court to declare an equitable lien against certain funds in the hands of

Kate B. Goltra and E. Field Goltra, Jr., as executors of the estate of Edward F. Goltra, deceased, and also for the specific performance of a written contract of May 6, 1932, between petitioner and Edward F. Goltra. The respondents, Erastus Wells, J. Clark Streett, and Tom K. Smith, Trustees Under Indenture of Trust dated December 28, 1934, executed by Rolla Wells, were permitted to intervene as defendants in the District Court on the ground that they were creditors of Edward F. Goltra and that the granting of the relief sought by petitioner would impair their rights as creditors (R. 2).

Motions of respondents to dismiss the amended petition filed in said cause (R. 14-15) were sustained by the District Court (R. 15) and from a judgment of the District Court dismissing its amended petition (R. 15) petitioner duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court in an opinion rendered on July 27, 1944 (R. 29-41).

In the amended petition (R. 4-13), which both the District Court and the Court of Appeals held insufficient to warrant the granting of the relief prayed, it was alleged:

That in September, 1920, Edward F. Goltra, who was then the president, and a majority and controlling stockholder, of the Mississippi Valley Iron Company, and John M. Jamison, president of the petitioner, were and had been for many years close personal friends; that in September, 1920, Goltra called on Jamison at the latter's home in Greensburg, Pennsylvania, and stated to him that he (Goltra) and those associated with him, had organized the Mississippi Valley Iron Company, a Missouri corporation, for the manufacture of pig iron in the City of St. Louis; that they had recently completed a reconditioned modern blast furnace and that they had sufficient ore for the manufacture of pig iron, but that they had not been able to

secure a suitable grade of coke for the operation of their blast furnace; that petitioner was engaged in the manufacture of coke, among other products, and at the request of Goltra, and upon his representation that, although the Mississippi Valley Iron Company was at that time short on working capital, it nevertheless had on hand enough orders for pig iron which would enable it to accumulate and acquire a working capital as soon as it could fill such orders, the said Jamison agreed to and did prevail upon petitioner to sell on open account to Mississippi Valley Iron Company sufficient coke for the requirements of that company; that during October, November and December, 1920, petitioner sold to the Iron Company, on open account, coke in the aggregate amount of $167,377.40; that shortly thereafter the pig iron market suffered a collapse both in demand and price and the Iron Company was compelled to cease the manufacture of pig iron; that when the accounts for the coke so purchased by the Iron Company from petitioners became due they were not paid and that from time to time thereafter and at the instance and request of Goltra, petitioner was induced to accept sixty and ninety day trade acceptances of the Iron Company for said accounts upon the representation of Goltra that the pig iron which had previously been sold by the Iron Company would be sufficient to pay off said trade acceptances when they became due, but that said trade acceptances were never paid and that thereafter, and at the instance and request of Goltra, petitioner accepted 306 Mortgage Seven Per Cent Gold Bonds of the iron company of an aggregate face value of $153,000 in lieu of said trade acceptances, which said bonds petitioner alleged upon information and belief had been the bonds of Goltra; that said bonds bore interest until the date of their maturity, July 1, 1931, at the rate of 7% interest per annum and thereafter at the rate of 8% per annum and that all

of said bonds, together with interest thereon, were due and unpaid at the time of the filing of this suit and represented, in principal and interest, a sum in excess of $450,000.

That prior to May 6, 1932, Edward F. Goltra was asserting a claim for damages against the United States on account of the cancellation by it of a certain leasehold interest owned by Goltra on certain boats and barges; that on May 6, 1932 bills were pending in the Senate and House of Representatives of the United States authorizing and empowering Goltra to institute and prosecute a suit against the United States in the Court of Claims on account of the cancellation of his leasehold interest in said boats and barges, which bills had not then passed either the Senate or House of Representatives; that on May 6, 1932, Goltra proposed to Jamison that if petitioner would advance to him the sum of $5,000 to enable him to pay a part of the expenses incurred, and to be incurred by him in his efforts to procure the enactment of said bills and in connection with the institution and prosecution of a suit on his claim against the United States if said bills were enacted, he, Goltra, would apply a certain portion of the proceeds of any judgment which he might recover against the United States on said claim to the purchase of all, or an equivalent amount, of the mortgage bonds of the Iron Company so owned and held by petitioner; that thereupon a written contract dated May 6, 1932, was entered into between petitioner and Edward F. Goltra, setting forth the understanding arrived at between said parties, and pursuant thereto, petitioner advanced to Goltra the sum of $5,000 for the purposes and on the terms and conditions as aforesaid.

That under the terms of the written contract of May 6, 1932, Edward F. Goltra agreed that if he prevailed in his suit against the United States the net proceeds of any

judgment recovered by him therein would be applied by him to the purchase of the bonds of the Iron Company owned by petitioner, as follows:

If the net proceeds of the judgment should be less than $150,000, one-third thereof should be applied to the purchase of said bonds of an equivalent amount in value.

If the remaining proceeds of said judgment should be in excess of $150,000 and less than $250,000, an additional 40 per cent of such excess should be applied to the purchase of said bonds of an equivalent amount in value.

If the remaining proceeds of said judgment should exceed $250,000 and should be less than $350,000, an additional 50 per cent of such excess would be applied to the purchase of said bonds of an equivalent amount in value.

If the net proceeds of said judgment should exceed $350,000, all of the bonds of the Iron Company owned by petitioner would be purchased by Goltra from the net proceeds of said judgment.

The amended petition further alleged that Goltra, having thereafter been authorized and empowered so to do by an Act of Congress, instituted suit against the United States for damages for and on account of the cancellation of his leasehold interest in said boats and barges; that Goltra was awarded a judgment in said suit but died shortly thereafter; that the net proceeds of the judgment received by Goltra's executors in that suit amounted to $281,415 and that under the terms of Goltra's contract of May 6, 1932, his executors were obligated to apply the sum of $105,707 to the purchase of petitioner's bonds in an equivalent amount; that petitioner had, upon the payment of said judgment, tendered to Goltra's executors bonds of the Iron Company of the face value of $106,000 and had in conformity with said contract demanded of Goltra's executors the payment of the sum of $105,707 out of the net proceeds of said judgment in exchange for said bonds,

which demand Goltra's executors had refused and declined to comply with.

The amended petition further alleged that Edward F. Goltra was insolvent at the time of his death; that after his death claims had been filed and allowed against his estate in excess of the sum of $300,000; that the Mississippi Valley Iron Company had become bankrupt and that the bonds of that company owned by petitioner were of little or no value.

The executors of Goltra's estate filed a motion to dismiss on the ground of failure of the amended petition to state a cause of action because:

(1) The amended petition was wholly without equity.

(2) The contract of May 6, 1932, between Goltra and petitioner was champertous and therefore void and unenforceable.

The intervening defendants also filed a motion to dismiss and in addition to the foregoing grounds asserted two others:

(3) That the contract of May 6, 1932, was against public policy as constituting a speculative investment in the financial results of certain proposed legislation in Congress, therefore could not be enforced in a court of equity.

(4) That if the contract of May 6, 1932, be construed as giving petitioner a lien upon the proceeds of the claim and judgment against the United States, said lien was null and void because forbidden by the terms of Title 31, section 203, of the United States Code.

The District Court sustained both of these motions on all the grounds specified and petitioner having announced its intention of standing on the amended petition, final judgment was entered by the District Court dismissing that petition (R. 15-16).

THE HOLDING OF THE COURT OF APPEALS.

The Court of Appeals held:

(1) That the agreement of Edward F. Goltra in the contract of May 6, 1932, that he would, if he was successful in his claim against the United States, apply a certain portion of the net proceeds of any judgment recovered by him on that claim to the purchase and acquisition of all, or a part of, the bonds of the Mississippi Valley Iron Company owned by petitioner, constituted a mere promise on the part of Goltra that he would purchase said bonds if he was successful in his claim against the United States and did not create an equitable lien in favor of petitioner upon the net proceeds of the judgment recovered by him in his suit against the United States.

(2) That petitioner was not entitled to specific performance of the contract of May 6, 1932, because this would give it a preference over other creditors of Edward F. Goltra.

(3) That petitioner was not entitled to equitable relief in any event because the contract of May 6, 1932, was based on a gamble or hazard and savored of champerty under the Missouri law.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT.

(1) The holding of the Court of Appeals that the agreement of Edward F. Goltra in the contract of May 6, 1932, that if he was successful in his claim against the United States he would apply a certain part of the net proceeds of the judgment realized by him on said claim to the purchase or acquisition of all, or a part of, the bonds of the Mississippi Valley Iron Company owned by petitioner, did not create an equitable lien in favor of petitioner in

the net proceeds of the judgment recovered by Goltra on his claim against the United States, is contrary to the holding of this Court in Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In Re Paschal, 10 Wall. 483, 19 L. Ed. 992, and Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163, and is likewise contrary to the holding of the United States Circuit Courts of Appeal in McCormack v. Harrah (App., D. C.), 51 F. 2d 316; Wardman v. Leopold (App., D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; In Re Interborough Consol. Corp. (C. C. A. 2), 288 F. 334; Walker v. Hartford Realization Company (C. C. A. 2), 74 F. 2d 56; American Surety Company v. Finletter (C. C. A. 3), 274 F. 152.

(2) There is a conflict in the decisions of the United States Supreme Court and also in the decisions of the Circuit Courts of Appeal on the question whether an agreement to pay a debt out of a particular fund gives the debtor an equitable lien on the fund. Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; Jackman v. Newhold (C. C. A. 8), 28 F. 2d 107; Lone Star Cement Corp. v. Swartwout (C. C. A. 4), 93 F. 2d 767, deny, whereas Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In re Paschal, 10 Wall. 483, 19 L. Ed. 992; Ingersoll v. Coram, 211 U. S. 335, 52 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163; McCormack v. Harrah (App. D. C.), 51 F. 2d 316; Wardman v. Leopold (App. D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; Interborough Consol. Corporation (C. C. A. 2), 288 F. 334; Walker v. Hanford Realization Co. (C. C. A. 2), 74 F. 2d 56; American Surety Co. v. Fin-

letter (C. C. A. 3), 274 F. 152, affirm the existence of an equitable lien under such an agreement.

(3) The holding of the Court of Appeals that the contract of May 6, 1932 involved a hazard or gamble and savored of champerty under the Missouri law and that as a consequence petitioner was not entitled to equitable relief in the Federal Court, is contrary to the holding of the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. (2d) 742, and De Pass v. Harris Wool Co., 346 Mo. 1038, 144 S. W. (2d) 146, and is also contrary to the holding of the Circuit Court of Appeals for the District of Columbia in Gesellschaft v. Brown, 78 F. 2d 410, and Wardman v. Leopold, 85 F. 2d 277.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, directing that Court to certify and send to this Court for its review a full and complete transcript of the record and all proceedings in the cause entitled "Jamison Coal & Coke Company, a corporation, Appellant, v. Kate B. Goltra and E. Field Goltra, Jr., executors of the estate of Edward F. Goltra, deceased, and Erastus Wells, J. Clark Streett, and Tom K. Smith, Trustees etc., appellees, No. 12,823," and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in said cause be reversed by this Court.

Respectfully submitted,

JAMISON COAL AND COKE COMPANY,
a Corporation,

Petitioner,

By JOSEPH H. GRAND,
JAMES C. JONES, JR.,
LON O. HOCKER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Eighth Circuit has not yet been reported, but will be found on pages 29 to 41 of the Record herein.

2. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 USCA, Sec. 347).

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court dismissing petitioner's amended petition was rendered July 27, 1944 (Rec., p. 42) and a petition for a rehearing was denied on August 23, 1944 (Rec., p. 71). Thirty days stay of mandate was granted by the Court of Appeals on September 2, 1944 (Rec., p. 71).

The following cases are believed to sustain the jurisdiction of this court:

Helvering v. Oregon Mutual Life Ins. Co., 311 U. S. 267, 268, 85 L. Ed. 180;

United States v. Chicago, Milwaukee & St. Paul, 312 U. S. 592, 593, 85 L. Ed. 180;

Reconstruction Finance Corporation v. Bankers Trust Co., 318 U. S. 163, 166, 87 L. Ed. 680;

Helvering v. American Dental Co., 318 U. S. 322, 325, 87 L. Ed. 785;

Clearfield Trust Co. v. United States, 318 U. S. 363, 366, 87 L. Ed. 838;

Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434, 435, 87 L. Ed. 884;

Carter v. Kuhler, 320 U. S. 243, 246, 88 L. Ed. 13;

Merchants National Bank of Boston v. Commissioner of Internal Revenue, 320 U. S. 256, 259, 88 L. Ed. 55;

Atlantic Refining Co. v. Moller, 320 U. S. 462, 464, 88 L. Ed. 201.

3. STATEMENT OF CASE.

In the petition for the writ herein is a statement of the case so far as is material to the consideration of the questions presented and, in the interest of brevity, a statement of the case is not repeated here.

4. SPECIFICATION OF ERRORS.

Petitioner assigns the following errors for a reversal of the judgment of the Court of Appeals:

(1) The Court of Appeals erred in holding that the agreement of Edward F. Goltra in the contract of May 6, 1932 to apply a certain portion of the proceeds of any judgment recovered by him on his claim against the United States to the purchase of all, or a portion, of the bonds of the Mississippi Valley Trust Company owned by petitioner did not give petitioner an equitable lien in the proceeds of the judgment recovered by Edward F. Goltra on his claim against the United States.

This holding is contrary to, and in conflict with, the holding of this Court in Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208; Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530; Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301; In re Paschal, 10 Wall. 483, 19 L. Ed. 992, and Valdes v. Larrinaga, 233 U. S. 705, 58 L. Ed. 1163, and is likewise contrary to the holding of the United States Circuit Courts of Appeal in McCormack v. Harrah (App., D. C.), 51 F. 2d 316; Wardman v. Leopold (App., D. C.), 85 F. 2d 277; Mitchell v. Bowman (C. C. A. 10), 123 F. 2d 445; In re Interborough Consol. Corp. (C. C. A. 2), 288 F. 334; Walker

v. Hartford Realization Co. (C. C. A. 2), 74 F. 2d 756, and American Surety Co. v. Finletter (C. C. A. 3), 274 F. 152.

(2) The Court of Appeals erred in holding that the contract of May 6, 1932 between Edward F. Goltra and petitioner involved a hazard or gamble and savored of champerty under the Missouri law and precluded the granting of equitable relief to petitioner in the Federal Court.

This holding is contrary to and in conflict with the Missouri law as announced and declared by the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. (2d) 742; DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S. W. (2d) 146, and is also contrary to and in conflict with the holding of the Circuit Court of Appeals for the District of Columbia in Gesellschaft v. Brown, 78 F. 2d 410, and Wardman v. Leapold, 85 F. 2d 277.

ARGUMENT.

I.

Equitable Lien.

In his contract of May 6, 1932 Edward F. Goltra agreed that in the event he was successful in his claim against the United States and should recover a final judgment therein, he would on payment thereof, after deducting the legitimate costs of such litigation, including counsel fees, "apply the proceeds remaining in the purchase from the party of the second part of the bonds of the Mississippi Valley Iron Company, of which it is the owner at par * * * in the following proportions:

> "If the proceeds remaining shall be less than $150,000, one-third (⅓) of such amount **shall be applied** to such purchase; in the event the proceeds remaining shall be in excess of $150,000 and less than $250,000, then of such excess **I agree to apply** forty (40%) per centum in addition to the purchase of said bonds; in the event the proceeds remaining shall exceed $250,000 and be less than $350,000, then of such excess **I agree to apply** fifty (50%) per centum in addition to the purchase of such bonds, and finally in the event the net recovery should exceed $350,000 I agree to purchase all of the bonds of said Mississippi Valley Iron Company owned by the party of the second part" (R. 13).

The amended petition alleges (R. 4, 8-9) that the net proceeds of the judgment received by Goltra's executors on Goltra's claim and suit against the United States amounted to $281,415 and that under the terms of the contract of May 6, 1932, Goltra's executors were obligated to apply $105,707 of that amount to the purchase of petitioner's bonds in an equivalent amount which they had declined to do.

Notwithstanding Goltra's agreement in this contract that he would, upon the payment to him of any judgment which he might recover on his claim against the United States, **apply** a certain portion of the net proceeds thereof to the purchase of an equivalent amount of the bonds of the Mississippi Valley Iron Company owned by petitioner, the Court of Appeals held (R. 38) that petitioner did not under that contract acquire an equitable lien on the net proceeds of that judgment to the extent of $105,707, or in any amount, for the purchase or acquisition of petitioner's bonds of an equivalent amount. This holding is, we submit, in conflict with the prior holding of this Court and also with the holding of the Courts of Appeal in other circuits.

In Wylie v. Coxe, 15 How. 415, 420, 14 L. Ed. 301, the court held that an agreement to pay an agent 5 per cent of the amount which should be recovered under a claim against the Mexican Government gave the agent an equitable lien on the fund to that extent, and said:

> "The evidence proves that the complainant was to receive a contingent fee of five per centum, out of the fund awarded, whether money or script. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to, and not the personal responsibility of the owner of the claim. A bill filed under the act would have authorized an injunction for the amount claimed, by complainant. Such a procedure would be within the act. But under the contract the lien on the fund in the hands of the administrator is a sufficient ground for an equity jurisdiction."

In Ingersoll v. Coram, 211 U. S. 335, 367, 53 L. Ed. 208, the court held that a contract by one of the contestants of a will to pay an attorney for his services $100,000 out of the funds realized by the contestant from the estate of

the deceased if the will contest was successful created an equitable lien in favor of the attorney on the funds so realized by the successful contestant, and said:

"The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the Circuit Court upon the argument of the demurrer. However, the court said that 'upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to on behalf of Mr. Ingersoll.' On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying: 'Whether or not the particular agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility of J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer and proofs, the bill must be sustained.' **This conclusion of the court is sustained by authority.** In **Wylie v. Coxe**, 15 How. 415, a contract was made with an attorney for the prosecution of a claim against Mexico **to pay him a contingent fee** of five per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund.

"In In re Paschal, 10 Wall. 483, in the letter retaining Paschal it was said that his compensation would depend upon the action of a future legislature, 'unless a recovery is had in the suit, in which event I shall feel authorized to **let you retain it out of the amount received.**' It was held that in accordance with the **prevailing rule** in this country Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in McPherson v. Cox, 96 U. S. 404, 417, and the doctrine repeated. See also Central Railroad v. Pettus, 113 U. S. 116; Louisville etc. Railroad Co. v. Wilson, 138 U. S. 501, 507. In Walker v. Brown, 165 U. S. 654, it was held that **every**

express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular, real or personal, or fund, therein described or identified, **a security for a debt** or other obligations, **creates an equitable lien** on the property so indicated. This was an application of the doctrine of Fourth Street Bank v. Yardley, 165 U. S. 634, and Ketchum v. St. Louis, 101 U. S. 306. These cases are not opposed by Trust v. Child, 21 Wall. 441, and Wright v. Ellison, 1 Wall. 16. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it. **These conditions are satisfied in the case at bar.**''

In Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530, Barnes, an attorney, was employed to prosecute a mining claim under an agreement to pay him one-fourth of all that should be recovered in the suits on those claims. Barnes employed the plaintiff, Alexander, an attorney, to assist him in those suits, and agreed to pay him, in the event of success, one-third of the fee which Barnes should receive. The court held under this agreement that Alexander had an equitable lien on one-third of the fee received by Barnes as the result of those suits. Mr. Justice Holmes, speaking for the court in that case, said, l. c. 119-120:

> ''The whole matter rests on conversations, in one of which Barnes said to Street and Alexander, 'if you will attend to this case I will give one one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanniger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.' In others also he explained what his firm was to have and told Street and Alexander that they should get one-third of that if they would do certain work that he had not time to attend to. Street and Alexander did the work required, it does not matter

whether it was more or less;—there was some attempt to raise a question about the fact, but we regard it as beyond dispute. The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon Trist v. Child, 21 Wall. 441. In that case Child had an agreement with Trist that Child should take charge of a claim of Trist before Congress and should receive twenty-five per cent. of whatever sum Congress might allow. The suit alleged a lien on the sum allowed and prayed that Trist might be enjoined from withdrawing the money from the Treasury and might be decreed to pay the amount due. The bill was dismissed on the ground that the contract was illegal, but it was added that Child had no lien because it was forbidden by act of Congress, and also, it was said, because there was no sufficient appropriation of the fund, so that the only remedy, if there had been one, would have been at law. (Wright v. Ellison, 1 Wall. 16; Christmas v. Russell, 14 Wall. 69.) This decision, so far as it concerns us here, seems to have overlooked Wylie v. Coxe, 15 How. 415, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. The remarks in Trist v. Child were not necessary to the decision, which was placed mainly on other grounds, so that at least we are warranted in treating the question as at large. * * *

(l. c. 121) "Obviously the only thing intended or desired was to give the appellees a claim to one-third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes unless discharged to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but

the important thing is not whether they used the present or the future tense but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See National City Bank v. Hotchkiss, 231 U. S. 50, 57. He promised only that if, when and as soon as he should receive an identified fund one-third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. Sharington v. Strotton, Plowden, 298, 308. Hogan v. Barry, 143 Massachusetts 538. Ladd v. Boston, 151 Massachusetts 585, 588. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. Mornington v. Keane, 2 DeG. & J. 292, 313. Holroyd v. Marshall, 10 H. L. C. 191, 211.

"The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the principle not only of Wylie v. Coxe, supra, but of Ingersoll v. Coram, 211 U. S. 335, 365-368, which cites it in later cases. See further to the same point, Burn v. Carvalho, 4 My. & Cr. 690, 702, 703. Rodick v. Gandell, 1 DeG., M. & G. 763, 777, 778. Harwood v. La Grange, 137 N. Y. 538, 540. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. There is or ought to be but one rule, that suggested by plain good sense."

In Valdes v. Larrinaga, 233 U. S. 705, 709, 58 L. Ed. 1163, the court held that a contract under which one of

the contracting parties was to receive a 10 per cent interest in the profits of a water franchise for helping to secure it and for assisting in the plans therefor, gave him an equitable lien in the profits derived from the concession and said:

> "It is objected in the first place that the case is not one for equitable relief. But whether the contract created a partnership * * * or not * * * it gave the appellee an **equitable interest** in the concession to the extent of securing his share of the profits, if any, and attached to those profits specifically if and when they came into being. Barnes v. Alexander, 232 U. S. 117, 121."

In McCormack v. Harrah (App. D. C.), 51 F. (2d) 316, it was held that the contingent fee contract of an engineer who was employed to make an investigation and surveys in connection with a claim against the Cuban government created an equitable lien in favor of the engineer on the amount realized on such claim.

In Wardman v. Leopold (App. D. C.), 85 F. (2d) 277, the court held that a contingent fee contract of tax experts, who were not lawyers, for a certain percentage of all tax refunds which they obtained for a taxpayer created an equitable lien in favor of these tax experts in such refunds. The court said (l. c. 281):

> "Thus it would seem that on the question of whether or not an equitable lien is created upon the fund under the circumstances detailed in the present case, **it is immaterial whether** it be for an attorney's fee, as in the Barnes (232 U. S. 117) and Ingersoll (211 U. S. 335) cases; or for the fee of an engineer, as in the Harrah case (51 F. [2d] 316); or the fee of tax specialists, as in the instant case."

In Mitchell v. Bowman (C. C. A. 10), 123 F. (2d) 445, one Mitchell entered into a contract with Jones, an archi-

tect, under which Jones agreed to pay Mitchell two-thirds of all fees which he should receive for architectural services under all municipal contracts which should be secured for him by Mitchell. The court held that under that contract Mitchell had an equitable lien on all architectural fees received by Jones in connection with such contracts for his two-thirds interest therein. The court said (l. c. 447):

> "The fund was not in existence at the time of the execution of the contract; and, in a strictly technical sense, the lien could not attach until the fund came into being. But when the fund actually became existent, the lien immediately attached and related back to the time of the execution of the contract."

In In re Interborough Consol. Corporation (C. C. A. 2), 288 F. 334, 349, the court held that a promise to pay out of a particular fund created a lien on the fund and said:

> "But it is now definitely settled in the federal courts that a promise to pay out of a particular fund creates a lien on the fund, which attaches to the fund when it comes into existence and which equity will enforce, holding the promisor to be a trustee as soon as he gets title. Barnes v. Alexander, 232 U. S. 117, 120, 34 Sup. Ct. 276, 58 L. Ed. 530.
>
> "A contract whereby a contracting party sufficiently indicates an intention to make some particular property or fund which it describes a security for a debt or other obligations creates an equitable lien on the property so indicated. Ingersoll v. Coram, 211 U. S. 335, 368, 29 Sup. Ct. 92, 53 L. Ed. 208. A contract which shows an intention to charge a particular property therein identified with an obligation creates an equitable lien thereon. Houselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740. And if a party by agreement creates a charge or claim in the nature of a lien on property of which he is the owner or in possession,

a court of equity will establish and enforce it, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take with notice. Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865."

In Walker v. Hartford Realization Co. (C. C. A. 2), 74 F. (2d) 56, the court held that an agreement to pay a claim out of a particular fund created an equitable lien, although it was recognized that prior to Barnes v. Alexander, 232 U. S. 117, there was a conflict in the federal cases whether a promise to pay out of a particular fund created an equitable lien in the fund, but that in the Barnes case the court had definitely resolved that conflict in favor of an equitable lien under such a promise. The court in that connection said (l. c. 57):

"It is argued that such an agreement does not create a lien, but the decision of the Supreme Court in Barnes v. Alexander, 232 U. S. 117, seems precisely in point and sustains complainant's position. There Barnes said to Alexander: 'If you will attend to this case I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger & Marks.' Justice Holmes remarked in the course of his opinion that: 'The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien.' He cited in support of this conclusion: Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753; Ingersoll v. Coram, 211 U. S. 335, 365-368, 53 L. Ed. 208; Burn v. Carvalho, 4 My. & Cr. 690, 702, 703; Rodick v. Gandell, 1 DeG. M. & G. 763, 777, and Harwood v. LaGrange, 137 N. Y. 538, 540, 32 N. E. 1000, all of which indicate that an agreement to pay out of an identifiable fund when it shall come into being gives rise to a lien. To the New York decision may be added the recent case of Archibald v. Panagoulopoulos, 233 N. Y. 478, 135 N. E. 857; Wilson v. Seeker, 72 N. J. Eq. 523, 66 A. 909; Geddes v. Reeves

Coal & Dock Co. (C. C. A. 8), 20 F. 2d 48, 54 A. L. R. 282; U. S. Fidelity & Guaranty Co. v. Bristow (D. C.), 4 F. 2d 810, and American Surety Co. v. Finletter (C. C. A.), 274 Fed. 152, are in accord.

"There are authorities holding that an equitable lien will only be imposed where there is an agreement to assign a fund present or future. Such are Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Christmas v. Russell, 14 Wall. 69; Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; Palmer v. Carey (1926), A. C. 703; Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314, but we think in so far as these may be said to differ from Barnes v. Alexander, 232 U. S. 117, 58 L. Ed. 530, we are bound by the latter."

In American Surety Co. v. Finletter (C. C. A. 3), 274 Fed. 152, the court held that the following provision of a contract for a public work created an equitable lien in favor of the surety as against general creditors of the contractor:

"Deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or material supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon said surety by reason of its suretyship as aforesaid."

And in answer to the contention that under the holding in Christmas v. Russell, 14 Wall. 69, the foregoing provision did not create an equitable lien, the court said (l. c. 156):

"The case of Christmas v. Russell turned mainly, if not entirely, upon a question of jurisdiction. Without discussing the views there expressed with reference to a valid equitable assignment, we are inclined rather to the views of the same court expressed in

Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208, accepting the rule stated in Walker v. Brown, 165 U. S. 654, 41 L. Ed. 865, to the effect that an express executory contract in writing, whereby the contracting parties sufficiently **indicate an intention to make some particular property or fund therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated.** Barnes v. Alexander, 232 U. S. 117, 120, 121, 58 L. Ed. 530; Hurley v. Ashbridge, 55 Pa. Super. Ct. 523, 526, 527; Stehle v. United Surety Co., 107 Md. 470, 68 Atl. 600."

The Court of Appeals, while apparently recognizing the analogy of the Ingersoll and Barnes cases, supra, to the case at bar, nevertheless held that the contingent fee contract of an attorney on the right to an equitable lien is distinguishable from other contracts because the services of the attorney helps to bring the particular fund into existence. Clearly this is not a sound or reasonable differentiation, because the sum of $5,000 which petitioner paid to Mr. Goltra to assist him in meeting the expenses necessary to secure the required authorization of Congress for the institution of his claim or action against the United States and in defraying the expenses of the suit on that claim after it had been authorized, likewise helped to bring the fund into existence. In other words, what an attorney helps to create by his personal efforts petitioner in this instance helped to create by its money. We submit, therefore, that because in the one instance the claimant happens to be an attorney and in the other instance a layman can make no difference on the right to an equitable lien on the fund which the plaintiff in the one instance helps to create by his personal service and in the other instance by an expenditure of his personal funds. Furthermore, neither this Court nor the Federal Courts of Appeal have in cases which did not involve contingent fee con-

tracts of attorneys have made any such distinction on the right to an equitable lien on the fund.

The Court of Appeals, in support of its holding that the contract of May 6, 1932 did not create an equitable lien in favor of petitioner in the proceeds of the judgment recovered by Goltra against the United States, relies upon Union Trust Co. of Maryland v. Townshend (C. C. A. 4), 101 F. 2d 903, and Lone Star Cement Corp. v. Swartwout, 93 F. 2d 767, decided by the Circuit Court of Appeals for the Fourth Circuit.

In the Swartwout case the court held that a promise of a debtor to pay a debt out of the proceeds realized from the sale of certain property did not create a lien in favor of the creditor on the fund. This holding was based on the holding in Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762, which this court in the Barnes case, supra, declined to follow because the court in the Christmas case had overlooked its prior and contrary holding in Wylie v. Coxe, 15 How. 415, 14 L. Ed. 301.

The holding of the majority of the Court of Appeals for the Fourth Circuit in the Townshend case, supra, is not in point because it was held in that case that an agreement on the part of a debtor that the proceeds of the sale of certain property should be paid to a third person and that when so paid the fund should be applied to the payment of a debt **did** create an equitable lien in favor of the debtor upon the proceeds realized upon the sale of the property. Judge Soper dissented in the Townshend case on the ground that the agreement in that case was merely one for the payment of a debt out of a particular fund and that under the previous holding in the Swartwout case this did not give the debtor an equitable lien on the fund. However, Judge Soper in his dissenting opinion in the Townshend case, recognized that there was a conflict in the decisions of this court on this question and in that connection said (101 F. 2d, l. c. 916):

"It is therefore important to note that even if the federal courts have broadened the strict requirements of Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762 (see B. Kuppenheimer & Co. v. Mornin, 8 Cir., 78 F. 2d 261, 264, 101 A. L. R. 75), such is not the case with the Supreme Court of West Virginia. That court has recently refused to follow such decisions as Barnes v. Alexander, 232 U. S. 117, 34 S. Ct. 276, 58 L. Ed. 530, insofar as they may seem to depart from the earlier rule, as is shown by the following quotation from Arnold v. Buckhannon Bank, 116 W. Va. 589, 183 S. E. 52. In that case the court was called on to pass upon the claim of a creditor to prior payment out of a designated fund. The plaintiff had lent money to a bank to be applied to the payment of interest on notes for which he was not responsible; and the bank agreed to repay him the advances out of the first money it received on the notes from the makers, or from a sale of the makers' property. The court held that this was a mere agreement that the debt should be paid out of a designated fund when received by the debtor and was not an assignment of and created no equitable right to the fund. Commenting on the differences on the subject that have arisen in the federal courts, the Supreme Court of West Virginia had this to say: 'There is some difference of authority on a situation like this, occasioned mainly by the fluctuation thereon of the federal courts.' For demonstration of this statement, see the several holdings in Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762; In re Stiger (D. C.), 202 F. 791; Barnes v. Alexander, 232 U. S. 117, 34 S. Ct. 276, 58 L. Ed. 530; In re Interborough Consol. Corp. (C. C. A.), 288 F. 334, 32 A. L. R. 932; East Side Packing Co. v. Fahy Market (C. C. A.), 24 F. 2d 644. The Virginia courts, however, are committed to the rule that to constitute an equitable assignment, the debtor must by order or otherwise place the creditor in position to compel payment of the debt from the holder of the fund; and that a mere agreement

between debtor and creditor that the debt should be paid out of a designated fund, when received by the debtor, is not an assignment of and creates no equitable right to the fund."

II.

Champerty.

The Court of Appeals in holding that the contract of May 6, 1932, was a gambling contract and savored of the character of maintenance, and was therefore unenforceable under the Missouri law, and consequently could not be enforced by a Federal court of Missouri, ruled the case on the assumption that under that contract Goltra had agreed, in consideration of the payment to him by petitioner of the sum of $5,000, to pay the plaintiff the sum of $105,707 in the event he was successful in his claim against the United States. In so holding the Court of Appeals ignored the allegations of the amended petition that (1) petitioner, at the solicitation of Goltra, and because of the friendship between petitioner's president and Goltra, was induced to sell to the Mississippi Valley Iron Company, of which Goltra was the president and controlling stockholder, $163,377 of coke on an open account, which petitioner would not otherwise have sold to that company unless satisfactory credit or security arrangements had been made for the payment of said coke; (2) that petitioner was thereafter induced by Goltra to accept trade acceptances for the coke which it had previously sold to the Mississippi Valley Iron Company on an open account, and that later petitioner was induced by Goltra to exchange and surrender said trade acceptances for $153,000 of the bonds of the Mississippi Valley Iron Company, which bonds petitioner alleged, upon information and belief, were owned by Goltra individually; (3) that by reason of the foregoing there was a moral

obligation on the part of Goltra to protect the petitioner against any loss on said bonds, and which moral obligation he recognized by the execution of the contract of May 6, 1932; and (4) that it was Goltra himself who proposed to petitioner that if it would advance to him the sum of $5,000 to help defray his expenses in connection with his claim against the United States, he would, in the event he was successful in that claim, apply a certain part of any judgment which he should realize on that claim to the purchase of all or a portion of petitioner's bonds.

If those allegations are taken into consideration, then the contract of May 6, 1932, was not one which involved a hazard or a gamble or a lottery, nor did it savor of the character of champerty, as held in the opinion filed. This is necessarily so because petitioner had, prior to the making of that contract, already sustained a loss of $163,377 as a result of having sold coke to Goltra's company on an open account, at Goltra's request. Furthermore, it was **Goltra,** and **not petitioner,** who proposed to make good that loss, in whole or in part, out of the proceeds of any judgment which he might recover on his claim against the United States if petitioner would pay him the sum of $5,000 to help defray his expenses in securing the necessary authorization to institute suit on that claim and in the prosecution of that suit if the necessary authorization was obtained. Under the contract of May 6, 1932 the amount of the net proceeds of the judgment recovered by Goltra's executors on that claim which petitioner was entitled to have applied to the purchase of its bonds was $105,000, which would **still leave a net loss to plaintiff of approximately $63,000** as a result of its dealings with Goltra, not counting at all the loss of interest in a much greater sum. Manifestly, therefore, it was only by ignoring the foregoing allegations of the petition that

the Court of Appeals reached the conclusion that this contract was a wager or a gamble.

Furthermore, the contract of May 6, 1932 was neither champertous nor did it savor of champerty under the Missouri law, as held by the Court of Appeals. Champerty under the Missouri law involves an officious intermeddling by one person in a suit or claim of another. As was said by the Missouri Supreme Court in Curry v. Dahlberg, 341 Mo. 897, 110 S. W. 2d 742, 748:

> "The purpose of the law of champerty and maintenance was to prevent **an officious intermeddling in the affairs of others for the purposes of speculation** or other unworthy motives, and to prevent the strong and influential men of early English times from oppressing the weak."

There was here no intermeddling, officious or otherwise, by petitioner in Goltra's claim against the United States, because, as alleged in the amended petition, it was Goltra himself, and not petitioner, who proposed and offered to apply a certain portion of the net proceeds of any judgment which he might recover against the United States to the acquisition of all or a portion of petitioner's bonds if petitioner would pay him the sum of $5,000 to help defray his expenses in connection with that claim.

Again, the doctrine of champerty has no application where, as here, the claim is against the United States.

In Gesellschaft v. Brown (App. D. C.), 78 F. (2d) 410, 414, the court in that connection said:

> "It follows that contracts for contingent compensation for the prosecution of a debt or individual contract claims against the government, even though they may require legislation and appropriation, and the procuring of legislation granting benefits, where no

other remedy existed for the enforcement of the claim against the government, have been generally upheld. **The old common law rule against champertous contracts has been generally abrogated in the federal courts of this country,** and largely so in the state courts, the equitable and just reason for this advance is comprehensibly stated in one sentence in Wright v. Tebbetts, 91 U. S. 252, 253, where the court said: 'To deprive a claimant of the means of obtaining such professional service would be to deprive him, in many instances, of the means of asserting and enforcing his claim.' "

And in Wardman v. Leopold (App. D. C.), 85 F. (2d) 277, 279, the court also held that the doctrine of champerty was inapplicable in a contingent fee contract of tax experts, who were not lawyers, for a certain percentage of any tax refund which they should secure in the claim of the taxpayer against the United States, and said:

> "We think it clearly appears that the contract here is not one to conduct litigation in the ordinary sense, **but to recover a claim from the government,** and therefore comes within the rule that such contracts are not champertous."

In Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, the court said:

> "Neither the definition of champerty nor the reasons why it was held to be an offense **have any proper application** such as that by which the defendant, under his contract with the plaintiff, sought to **enforce his claim against the Government of the United States.**"

Furthermore, as the contract of May 6, 1932, relates to a claim against the United States, the question whether that contract is enforceable in the Federal Court is not determinable by the Missouri law, as was held by the Court

of Appeals. On the contrary, it is determinable by the Federal law, and the Missouri Supreme Court has so held.

In De Pass v. B. Harris Wool Company, 346 Mo. 1038, 144 S. W. (2d) 146, the defendant contended that a contract under which the plaintiff, a layman, was employed by the defendant to represent it in rate reduction cases before the Interstate Commerce Commission was unenforceable in Missouri because it involved the practice of law by a layman, which was against the public policy of Missouri. The court held that, while it was against the public policy of Missouri to permit laymen to practice law before the administrative tribunals of that State, nevertheless the contract in suit related to proceedings pending before a federal administrative tribunal, and that since the contract was valid under the federal law the Missouri courts had no power or right to refuse to enforce it. The court in that connection said (144 S. W. [2d], l. c. 149):

> "In other words, our statute declares a policy against and makes illegal the practice by laymen before such boards as come within State jurisdiction; but does not affect or declare a policy against any right accorded by valid Federal law. The plaintiff's contract is valid under Federal law and that law is binding on the courts of this State."

Respectfully submitted,

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(20)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

JAMISON COAL AND COKE COMPANY, a Corporation,
Petitioner,

vs.

KATE B. GOLTRA and E. FIELD GOLTRA, JR., Executors of the Estate of Edward F. Goltra, Deceased, and ERASTUS WELLS, J. CLARK STREETT and TOM K. SMITH, Trustees Under Indenture of Trust Dated December 28, 1934, Executed by Rolla Wells,
Respondents.

No. 489.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF IN OPPOSITION THERETO.

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Dated at St. Louis, Missouri,
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PRELIMINARY STATEMENT.

The purpose of this brief in opposition to the petition for writ of certiorari is to aid this Court in orienting itself to the problems involved. Therefore, no endeavor is made to re-examine all the reasons and the numerous authorities upon which the Courts below have sustained the motion to dismiss.

SUMMARY OF ARGUMENT.

The decision of the Circuit Court of Appeals in affirming the dismissal of plaintiff's suit was correct because that suit was founded on a contract the enforcement of which must conform to Missouri law, by which law said contract is void and unenforceable because it is speculative and champertous.

Griffin v. McCoach, 313 U. S. 498, l. c. 503, 506;
Mississippi and Mo. R. R. Co. v. Cromwell, 91 U. S. 643, l. c. 645;
Burnes v. Scott, 117 U. S. 582, l. c. 589;
Curry v. Dahlberg, 341 Mo. 897, l. c. 909;
Taylor v. Perkins, 171 Mo. App. 246, l. c. 254.

HOLDING OF CIRCUIT COURT OF APPEALS.

The original action which petitioner brought in the District Court was for certain equitable remedies to enforce a contract dated May 6, 1932, entered into between petitioner and the late Edward F. Goltra, whereby petitioner agreed to advance $5,000 to be used by Goltra in connection with certain litigation he had against the United States Government and whereby Goltra agreed, in return, to apply a portion of any proceeds which he might gain from the litigation ($105,000 is the amount for which suit is here brought) to the purchase from petitioner of certain bonds alleged to be worthless. Your respondents were made defendants in this action as executors of the will of Edward F. Goltra. They moved *in limine* to dismiss the action and have contended throughout these proceedings that the contract of May 6, 1932, is unenforceable on two grounds; first, that it is devoid of equity, and, second, that it is champertous (Record p. 14). In these contentions they have been sustained by both the District Court (Record p. 15, Fol. 26), and by the Circuit Court of Appeals,

which held, as to the general equity point (Record pp. 39, 40):

> "One of the settled principles of equity is that a contract based on a hazard will not be enforced. **Mississippi and Mo. R. R. Co. v. Cromwell,** 91 U. S. 643, 645. Such was the character of the contract of May 6, 1932,"

and, as to the champerty point (Record pp. 40, 41):

> "The contract having been made in Pennsylvania, and the suit brought in a federal court in Missouri, the question is presented whether its enforceability is controlled by the lex loci contractus or the lex fori. In diversity of citizenship cases federal courts must follow the conflict of laws rules prevailing in the states in which they sit. **Klaxon Co. v. Stentor Co.,** 313 U. S. 487; **Order of United Commercial Travelers v. Meinsen,** 8 Cir., 131 F. 2d 176, 179. Federal courts consistently refuse to enforce contracts which are against the public policy of the state in which the court sits. **Griffin v. McCoach,** 313 U. S. 498, 503, 506; **Union Trust Co. v. Grosman,** 245 U. S. 412; **Logan & Bryan v. Postal Telegraph & Cable Co.,** E. D. Ark., 157 F. 570, 586, 587. Compare **Casserleigh v. Wood,** 8 Cir., 119 F. 308. In Missouri the rule is that foreign contracts contrary to the public policy of Missouri will not be enforced. **Maxey v. Railey & Bros. Banking Co.,** Mo. App., 57 S. W. 2d 1091, 1093.
>
> "In Missouri not only is a champertous contract void, **Curry v. Dahlberg,** Mo., 110 S. W. 2d 742, 748; **Taylor v. Perkins,** Mo. App., 157 S. W. 122, 124; **Burnes v. Scott,** 117 U. S. 582, 589; but a contract merely 'savoring of the character of maintenance' is void as against public policy. **Ryan v. Miller,** Mo., 139 S. W. 128, 132, 133. It is not necessary, therefore, to hold that the contract in this case comes strictly within the technical definition of champerty in order to sustain the ruling appealed from. The contract so far savored of the character of champerty as to justify the denial of equitable relief based upon its provisions."

ARGUMENT.

I. Contract Void as Champertous Under Missouri Law.

No useful purpose is served by following at length the ramifications of the petitioner's argument that the language of the contract is such as to create an equitable lien. The Circuit Court of Appeals, after reviewing the authorities on the question at some length, has reached the considered conclusion that, in view of the language used, no lien was created. Moreover, whatever the force of the language, the fact remains that the heart of the contract is blighted by champerty, and, therefore, the contract cannot be the basis of any action at law, far less one in equity. In this respect, Missouri law controls (**Griffin v. McCoach**, 313 U. S. 498, l. c. 503, 506). Both lower Courts, which are familiar with that law, have held that the petition based on this contract must fail because the contract, judged by Missouri law, is champertous in nature. This was the Missouri law when this Court said in 1886, in the case of **Burnes v. Scott**, 117 U. S. 582, l. c. 589:

> "At common law and by statute, both in England and in many of the United States, champerty was a criminal offense. But at the present time, in most of the States, to aid the lawful suit of another with money or services, in consideration of a share in the recovery, is not considered or punished as a crime. But in many of the States champertous contracts are considered void. This is the case in Missouri, where the present case was tried, the Supreme Court so holding, on the ground that the common law had been adopted by statute in that State. See **Duke v. Harper**, 66 Mo. 51."

And it remains the law in Missouri today.

"The law of champerty and maintenance is in force in this State * * * The purpose of the law of champerty and maintenance was to prevent officious intermeddling in the affairs of others for the purposes of speculation * * *." (**Curry v. Dahlberg**, 341 Mo. 897, l. c. 909.)

II. Petitioner's Arguments Answered and Authorities Distinguished.

Nor does petitioner suggest anything which would render questionable the decisions of the two lower Courts in respect to these central issues in the case. On the score of speculation, the only argument it can muster is that, because the Coal Company had lost heavily in its prior business relations with a company of which Goltra was president, it was justified in gambling on the outcome of Goltra's lawsuit against the Government. Its activities were not, so the argument runs, speculation for gain, but merely an endeavor to recoup losses. Plainly, the previous relationship of the parties has no bearing on the speculative nature of the transaction and the argument is wholly without merit.

On the score of champerty, petitioner cites, as ground for error by the Courts below, five cases, none of which will sustain that contention. (It should be noted, of course, that petitioner's approach to this question is in the manner of one seeking full review rather than writ of certiorari.) In this connection, petitioner makes two contentions. First, that there was no "intermeddling" by petitioner such as is referred to by the Court in Curry v. Dahlberg (supra) when it speaks of "an officious intermeddling in the affairs of others for the purposes of speculation." Petitioner contends that, because, by the allegations of the petition below, Goltra requested the Coal

Company to enter into the contract, the Company came on invitation and was therefore not an intermeddler. Obviously, the Coal Company, whatever its relation to Goltra, was an intermeddler as to the United States Government, which was the other party to the suit in which the Coal Company was buying an interest. In this connection, the often quoted language of the Court in Taylor v. Perkins, 171 Mo. App. 246, l. c. 254, is pertinent:

> "In the cases which have been decided by the Supreme Court, and in this Court, it has been stated and conceded that relations may aid one another, that the prosperous may, in charity, aid his poor and unfortunate friend, without incurring guilt of maintenance. But **where sordid gain is the contractual motive**, the ties of blood and of charity and friendship are succeeded by selfishness, and **what would have been humane maintenance becomes unlawful champerty.** In this respect there is a difference between champerty and maintenance. **Relationship, friendship,** charity, **may excuse maintenance, but not champerty.**" (Emphasis supplied.)

In the present case we are, of course, concerned with champerty (a bargain whereby money is advanced for litigation in exchange for an interest in the proceeds of the litigation over and above a mere return of the money advanced) rather than maintenance (a bargain whereby money is advanced in exchange for an interest in the proceeds of the litigation but only up to the amount advanced.)

Petitioner cites three cases to show that the law of champerty is not applicable in suits against the Government. Whatever the validity of such cases (which would seem to foster litigation against the Government), they do not purport to expound the common law of champerty as it is enforced in Missouri. Petitioner, recognizing this, cites De Pass v. B. Harris Wool Company, 346 Mo. 1038,

144 S. W. (2d) 146, in an effort to show that Missouri has chosen to look to federal law in such matters. The case cited stands for no such extraordinary proposition, but is authority for the rather obvious rule that the qualifications of a practitioner before an administrative board are to be established by the board itself.

CONCLUSION.

Consequently, the decisions of the lower Courts, far from containing such conflict with the established law as would warrant this Court in granting review by writ of certiorari, are fully consonant with the law and the decided cases, and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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